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No. 98-762

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,
Petitioner,
v.
ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF THE PETITION

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS* [1]

The Association of Private Pension and Welfare Plans ("APPWP") is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of this Nation's private employer-sponsored employee benefit plan system. The members of the APPWP include both small and large employer sponsors of employee benefit

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[1] No person or entity other than APPWP-member South Carolina National Bank ("SCNB") has made monetary contributions toward this brief, and no counsel for any party authored any portion of the brief. APPWP has filed with the Clerk of the Court the consents of counsel for the parties to file this brief.

plans (including many Fortune 500 companies), as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its approximately 240 members sponsor or administer plans covering more than 100 million plan participants.

This broad-based membership provides the APPWP with substantial expertise and experience in the entire spectrum of issues relating to all types of benefit plans, and the APPWP has filed *amicus curiae* briefs in numerous cases involving important issues for the employee benefit plan community. The issue presented by this case —whether the Secretary of Labor may seek additional monetary recovery on behalf of an employee benefit plan on a fiduciary breach claim that has been settled and released previously by the plan's representatives—is of vital importance to the members of APPWP. For this reason, APPWP respectfully submits this brief urging that the Petition for a Writ of Certiorari be granted.

SUMMARY OF ARGUMENT

In the decision below, the court of appeals held that the Secretary of Labor could pursue claims for monetary relief on behalf of a plan against a party which previously had been released from such liability as a part of a court-approved private settlement. ERISA claims for breach of fiduciary duty seeking money damages are, by definition, representative claims brought on behalf of the plan, whether the named plaintiff is a fiduciary, a participant, or the Secretary. *Massachusetts Mutual Life Ins. v. Russell*, 473 U.S. 134, 146-47 (1985). Once settled and released, necessarily on behalf of the plan, by any of the representatives authorized to bring an action, such claims are extinguished. *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29-31-32 (1st Cir. 1991). The decision of the court of appeals, therefore, is inconsistent with well-settled principles of *res judicata* and release—princi-

ples that effectuate the dual policies of finality and the encouragement of settlements.

Because of its unsettling effect, the decision below will contribute significantly to the mounting burden of maintaining employee benefit plans. As these burdens increase, so does the inclination of plan sponsors to reduce or eliminate benefits. They are, of course, free to do so: while ERISA regulates certain aspects of their design and operation, employee benefit plans are, as a general matter, creations of the sponsoring employer. Employers decide whether to establish a plan and the level of benefits provided. *See, e.g., Alessi v. Raybestos-Manhatton, Inc.*, 451 U.S. 504, 510-11 (1981). And employers are generally free to amend or terminate their plans in their discretion. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996). The legislative history of ERISA reveals Congress's awareness that, in light of the voluntary nature of employee benefit plans, care must be taken to avoid overregulation that would impede the creation and growth of benefit plans. H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. Because it will inevitably lead to an increase in the costs associated with maintaining employee benefit plans, the decision below undermines this important congressional goal.

Moreover, the decision below comes at a time when the volume of ERISA litigation is already on the increase. Indeed, more than 10,000 ERISA cases were commenced in fiscal year 1997 alone, an increase of 4 percent from the prior year. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1997*, Tables C-2, C-2A.[2] The overwhelming majority of these cases

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[2] This trend is likely to continue in the wake of several of the Court's recent decisions. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996) (participants may bring an action, seeking personal equitable relief, for breach of fiduciary duty); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510

are instituted by private parties; historically, the overwhelming majority are disposed of by settlement. Any impediment to the ability of private parties to settle their disputes can only increase the costs of litigation and thus the expense of maintaining benefit plans.

Nor is the public interest in the Secretary's enforcement role inconsistent with the policies favoring finality, settlement of disputes, and the continued growth of our private employee benefit plan system. The statutory scheme itself accommodates these interests. By statute, private parties initiating actions for fiduciary breach are required to serve a copy of their complaint on the Secretary. By statute, the Secretary is accorded the right, in her discretion, to intervene in any such litigation. Thus, the Secretary has the right to participate as a party in privately-initiated actions any time she believes the plan's interests might not be adequately protected by the private plaintiffs. In addition, the Secretary has the option, in lieu of intervening, to sue the fiduciaries who caused a plan to enter into any settlement that she finds objectionable. And, of course, nothing in the position urged by Petitioner would affect the Secretary's ability to seek declaratory or injunctive relief in a subsequent action. This regime enables the Secretary to fulfill her enforcement responsibilities and protect participants' interests without unduly burdening our private employee benefit plan system by sacrificing the benefits of voluntary settlements and finality.

ARGUMENT

In this case, the Secretary of Labor, on behalf of a pension plan, seeks a monetary recovery from SCNB for

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(1997) (ERISA's prohibition on interference with statutorily-protected rights extends to nonvested welfare benefits); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (state imposed surcharges on medical services designed to influence purchasing decisions of employee benefit plans are not preempted).

an alleged breach of fiduciary duty relating to a 1990 stock transaction. The court of appeals ruled that the Secretary's action could proceed, even though a class of all of the plan's participants, also on behalf of the plan, had previously released SCNB from all liability in connection with the 1990 transaction in a court-approved settlement. The court of appeals' ruling is erroneous as a matter of law and both unfortunate and unnecessary as a matter of policy.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S INTERPRETATION OF ERISA'S CIVIL ENFORCEMENT SCHEME

In the district court, separate actions were brought against SCNB under §§ 409 and 502(a)(2) of ERISA for breach of fiduciary duty by a class of plan participants and by the Secretary. Both of the separate actions challenged the same transaction and were asserted against the same defendants. Both sought monetary relief from SCNB (and the other defendants) on behalf of the Charter Medical Corporation Stock Ownership Plan. There was, however, one significant difference between these two cases —the Secretary's action was not commenced until *after* a settlement had been reached by the private parties and approved by the district court.

The settlement provided for a substantial monetary recovery by the plan to be funded by defendant Charter Medical Corporation, the plan's sponsor, consistent with its obligation to indemnify SCNB and certain other defendants. As part of the settlement, the private plaintiffs, on behalf of the plan, released the defendants from further monetary liability. The district court approved the settlement after a fairness hearing and subsequently dismissed the Secretary's complaint. *See generally* Pet. at 3-5. In reversing dismissal of the Secretary's action, the court of appeals held that the prior settlement did not preclude the

Secretary from seeking additional monetary relief for the same plan from the settling defendants on the same claim for relief.

The decision of the court of appeals is erroneous in that it fails properly to apply principles of *res judicata* and release in the context of ERISA claims for fiduciary breach seeking money damages. Such claims, under ERISA's comprehensive enforcement scheme, may be brought by "the Secretary, or by a participant, beneficiary or fiduciary" and may seek "appropriate relief under § 409." ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Section 409, in turn, prescribes the relief that may be awarded against "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title." 29 U.S.C. § 1109(a). Such relief includes a monetary recovery to compensate for "any losses to the plan resulting from each such breach." *Id.*

This Court held in Russell that §§ 409 and 502(a)(2) claims are brought in a representative capacity on behalf of the plan as a whole:

> A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

473 U.S. at 142. As a matter of law, then, these claims are representative claims brought on behalf of the plan as an entity, no matter who—a participant, a fiduciary, a beneficiary, or the Secretary—asserts them. It follows that no party, not even the government, can pursue such a claim after it has been settled and released. *See Chicago, Rock Island & Pacific Ry. v. Schendel,* 270 U.S. 611, 619 (1926).

This Court has long espoused a policy favoring the voluntary settlement of litigation. *See, e.g., Williams v. First National Bank,* 216 U.S. 582, 595 (1910). And *res judicata* is vital in order to "avoid the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-54 (1979). Because the court of appeals did not give effect to the representative nature of § 502(a)(2) claims, it failed properly to apply principles of preclusion and release. The result casts a cloud of uncertainty over private ERISA fiduciary litigation. And the adverse consequences for the employee benefit plan community can be expected to spread as ERISA litigation increases.

II. THE DECISION BELOW IS MISGUIDED AS A MATTER OF POLICY

A. Continued Increase in Plan Costs, Including the Cost of Litigation, Discourages the Formation of Private Employee Benefit Plans

In enacting ERISA, Congress was concerned that its regulatory efforts not be so onerous as to encourage "employers to respond . . . by decreasing benefits under existing plans or slowing the rate of formation of new plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. This is a realistic concern, since "[n]othing in ERISA requires employees to establish employee benefit plans" or "mandates what kind of benefits employers must provide, if they choose to provide such a plan." *Lockheed Corp. v. Spink,* 517 U.S. 882, 887 (1996); *accord, Alessi v. Raybestos-Manhatton, Inc.,* 451 U.S. 504, 510-11 (1981). ERISA's statutory scheme reflects Congress's recognition of "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987).

No one can dispute that litigation is a costly undertaking, and ERISA cases are no exception. Claims alleging breach of fiduciary duty are particularly burdensome, to plaintiffs and defendants alike. For example, fiduciary self-dealing claims are fact-intensive, and the prudence of a fiduciary's conduct—its reasonableness in the circumstances—often presents a triable issue of fact. *See* ERISA § 404, 29 U.S.C. § 1104; *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983). It is not uncommon for thousands of pages of documents to be reviewed and produced and scores of depositions taken. Experts and counter-experts are typically retained to evaluate the prudence of fiduciaries' investment decisions and assess damages. *See, e.g., Herman v. Mercantile Bank, N.A.*, 143 F.3d 419, 421 (8th Cir. 1998) (referring to expert testimony as to the value of stock purchased on behalf of a pension plan); *Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 150 (4th Cir. 1996) (noting that four expert witnesses testified at trial).

Fiduciary targets in these actions include banks, insurance companies, and consulting firms, in addition to plan sponsors and their agents. The brunt of the burden, however, is often borne by the sponsors. Not only are sponsors frequently fiduciaries with respect to their plans, at least for some purposes, but it is common for the sponsoring employer to indemnify its officers, directors, and employees who serve their plans, as well as outside service providers.[3] Thus, the financial burden of fiduciary litigation often falls disproportionately on the sponsor.

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[3] Indeed, ERISA expressly contemplates such arrangements. ERISA § 410(b)(3), 29 U.S.C. § 1110(b)(3) (employers may "purchas[e] insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan"); 29 C.F.R. § 2509.75-4 (permitting indemnification of fiduciaries by plan sponsor).

The decision below, if allowed to stand, will necessarily prolong § 502(a)(2) litigation commenced by private parties.[4] Given the threat of a subsequent action by the Department of Labor, such cases could not be settled, for practical reasons, at any time before the statute of limitations expired on the Secretary's claims. Defendants obviously have little incentive to contribute towards a settlement when they cannot obtain an effective release, and even where they do, their contributions will be less than they might otherwise pay to achieve true finality. This impediment to settlement thus operates to the detriment of our judicial system and employee benefit plans and their participants. Court's dockets will be unduly congested with pending cases that otherwise would be settled. And the inevitable delay in providing any recovery to the plan would, of course, prejudice employee benefit plans and their participants, many of whom, in the case of pension plans, are elderly.

In addition, under the decision below, plan sponsors, fiduciaries, and service providers are placed in an untenable position. Neither settlement nor final judgment guarantees repose. Even apart from the significant costs involved, exposing plan sponsors and fiduciaries to the threat of multiple and possible conflicting judgments inevitably would discourage the creation and maintenance of employee benefit plans.

B. ERISA Litigation, Along With Its Attendant Costs to Employee Benefit Plan Community, Is Increasing

There is no doubt that litigation involving employee benefit plans is on the rise. For example, a simple search of the WESTLAW database indicates that this Court de-

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[4] The overwhelmingly majority of civil ERISA cases are brought by private parties and not the Secretary of Labor. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1997*, Table C-2 (only 141 of the 10,045 ERISA cases filed in fiscal 1997 were brought by the government).

cided 18 ERISA cases between ERISA's enactment in 1974 and the end of 1989. From 1990 to the present, on the other hand, the Court has handed down no less than 29 such decisions. This trend is even more evident in the courts of appeals, which issued only 412 ERISA decisions before 1990 but approximately 1,680 such decisions in the nine years since. The Administrative Office of the U.S. Courts reports that the number of ERISA civil cases filed increased by 4 percent from fiscal 1996 to fiscal 1997, with more than 10,000 such suits being initiated in fiscal 1997 alone. *Judicial Business of the United States Courts 1997,* Table C-2A.

Nor is there any reason to believe that the volume of ERISA litigation will do anything but continue to grow. Some of the many ERISA cases decided by this Court in the past few years seem destined to provide fertile ground for developing new theories of liability that can be asserted against plan sponsors, fiduciaries, and service providers. Indeed, the impact of these decisions is already being felt in the lower courts.

For example, in *Varity Corp. v. Howe,* 516 U.S. 489 (1996), this Court held that individual plan participants suing on their own behalf, can bring an action seeking equitable relief for breach of fiduciary duty. Such claims are actionable under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), which allows participants, beneficiaries, and fiduciaries to seek equitable relief to redress statutory violations. Relying on the reasoning of *Russell,* some courts of appeals had held that no such action lies, since claims for breach of fiduciary duty are specifically addressed in § 502(a)(2) of the statute. *See, e.g., Kayes v. Pacific Lumber Co.,* 51 F.3d 1449 (9th Cir.), *cert. denied,* 116 S. Ct. 301 (1995).

The Court's decision in *Varity* thus cleared the way for a significant increase in the incidence of participant claims for breach of fiduciary duty. Like *Varity* itself, these cases often involve allegations of employer misrepresentations to

plan participants. *See, e.g., Farr v. U.S. West, Inc.*, 151 F.3d 908 (9th Cir. 1998); *Pocchia v Nynex Corp.*, 81 F.3d 275 (2d Cir. 1996). Such claims are inherently fact-specific and often do not lend themselves to summary disposition. For this reason, they impose a heavy burden on plan sponsors.

It is reasonable to expect that these and a host of other frequently-litigated issues will continue to occupy litigants and the courts for years to come. *Varity* claims are unlike this case in that they do not involve claims for monetary damages. But they nevertheless impose a substantial and increasing burden on plan sponsors. And the decision below, which all but guarantees an end to prompt settlement of private § 502(a)(2) fiduciary claims, threatens even greater harm. There is no justification for this result since, as explained in the next section, ERISA itself protects the competing interests of the Secretary of Labor in enforcing the statute, on which the court of appeals relied.

C. The Statutory Scheme Adequately Protects the Interests of the Secretary and the Public

Contrary to the court of appeals' suggestion, Pet. App. at 17a-19a, the ruling below is not necessary to protect the role of the Secretary in enforcing ERISA. Apart from her unfettered right to intervene in private litigation, the Secretary not only may bring an action for fiduciary breach against those who cause a plan to enter into an inadequate settlement, but also may pursue injunctive and declaratory remedies. There is no reason, then, for the Secretary's enforcement role to interfere with the expectations of private litigants. And there is no reason to jettison accepted common law principles of *res judicata* and release.

ERISA itself reconciles the policies favoring settlement and finality with the enforcement responsibility of the Secretary. The Secretary shares an equal right with private

parties to bring an action to enforce ERISA's fiduciary rules. ERISA § 502(a)(2), 502(a)(3), 502(a)(5), 29 U.S.C. § 1132(a)(2), 1132(a)(3), 1132 (a)(5). Under these provisions, a plan's participants, beneficiaries, fiduciaries, and the Secretary of Labor are all authorized to sue for breach of fiduciary duty and for other violations of the statute.

The Secretary, however, also has a right not given to private litigants. The Secretary "shall have the right to intervene in any action" brought by a private litigant. ERISA § 502(h), 29 U.S.C. § 1132(h). And she is assured a meaningful opportunity to exercise her right of intervention because any private party—a participant, beneficiary, or fiduciary—that brings an action for these fiduciary breach and statutory violations must serve a copy of the complaint on the Secretary. ERISA § 502(h), 29 U.S.C. § 1132(h). *Id.*

By statute, then, the Secretary must be notified of pending litigation and given the opportunity to participate as a party. Should it appear to the Secretary that the plan's interests might not be adequately protected by the private plaintiffs, she has only to take advantage of her statutory right of intervention. Having the status of a party, the Secretary could then participate fully in the court's evaluation of any proposed settlement, and she could appeal from a district court approval of a settlement which she finds inadequate.

Under the decision below, however, the Secretary's right to bring § 502(a)(2) claims is superior to that of private parties in a way that is *not* provided for in the statutory scheme. ERISA's civil enforcement scheme was designed to give participants and beneficiaries "ready access to the federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). Surely, the privilege of settling disputes on the terms they find acceptable is assumed to accompany the right to bring the action in the first place. Nothing in statutory scheme gives the Secretary effective veto power over private settle-

ments; nor should she be permitted to exercise such a power indirectly by bringing a duplicative action.

In any event, the Secretary has an entirely different remedy for any perceived inadequacies in the monetary recovery awarded in private settlements, other than relitigating previously settled claims. Under ERISA, a pension plan's fiduciaries are responsible for protecting the plan's interests. When a pension plan enters into a settlement, its fiduciaries must discharge their statutory responsibilities, including the duties to act prudently and solely in the interest of the plan's participants and beneficiaries. ERISA § 404(a), 29 U.S.C. § 1109(a); *see Central States Pension Fund v. Central Transp.*, 472 U.S. 559, 571 (1985) ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled."). If the Secretary believes a fiduciary violated these duties by accepting, on the plan's behalf, a settlement that provided too little in the way of a monetary recovery, her remedy is to bring a separate action against the fiduciary under §§ 409 and 502(a)(2) of ERISA.

Even if such an action were brought against a party who was a defendant in the settled action, it would challenge different conduct and thus would not be the same claim. In such an action, the Secretary, if successful, could recover from the breaching fiduciaries the difference between the amount the plan should have received and the amount awarded to the plan by the settlement. At the same time, the parties charged with fiduciary breach in the settled action would be protected by the common law's finality rules.

The only remaining interests that the Secretary asserted below are her interests in shaping the development of the law in this area and in deterring and preventing future violations, which interest is widely recognized. *See, e.g., Cunningham*, 716 F.2d at 1462 (Secretary's interest in preventing wrongdoers from causing losses to any future participant is "entirely separate and distinct from that of

a private litigant"). However, overturning the judgment below would in no way interfere with the Secretary's ability to perform this role, given her continued right to seek injunctive and declaratory relief.[5]

These mechanisms fully protect the Secretary's enforcement interest. She can shape the law of ERISA fiduciary responsibility by, for example, convincing a court that certain conduct is unlawful and obtaining an injunction against its repetition. The precedent set thereby would serve as notice to the employee benefit plan community of the state of the law to the same extent as would a money judgment. The courts need not override the common law's finality rules, which form a part of the backdrop on which Congress legislates, *see Astoria Federal Savings & Loan Ass'n v. Solimino,* 501 U.S. 104, 106-110 (1991), by permitting the Secretary to obtain multiple monetary recoveries.

Nor does § 502(1), calling for the assessment of a civil penalty on monetary recoveries obtained by judgment or settlement of actions initiated by the Secretary, change the analysis. By its terms, § 502(1) requires the imposition of the civil penalty only where the Secretary obtains monetary relief for a plan through litigation which the Secretary has initiated or pursuant to a settlement with the Department of Labor. She has no authority to impose the penalty in the abstract; her authority to do so is tied to her recovery of monies for the plan on a viable claim for relief. If, for example, the plan's losses were completely recovered in a private settlement, no penalty could be imposed regardless of any additional deterrent effect the penalty might have. By the same token, there is no basis for imposing the penalty where the underlying claim already has been extinguished by *res judicata* and release. In either case, the underlying predicate for the civil penalty's imposition no longer exists.

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[5] Indeed, in this case the Secretary did obtain injunctive relief against SCNB in a negotiated settlement. *See* Pet. at 13.

There is, in short, no justification for allowing the Secretary to upset private settlements and no reason to cast aside fundamental principles of jurisprudence to protect the Secretary's enforcement role.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the petition and issue a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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